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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 832

UNITED STATES OF AMERICA, ex rel. ANGELO ANTONIO CANTISANI,

Petitioner,

vs.

R. J. HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE OF CHICAGO, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Angelo Antonio Cantisani, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals, for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on the 1st day of November, 1956, and is not

reported, but appears in the record filed with and certified by the Clerk of the United States Court of Appeals; which is transmitted herewith. The record was printed for use in the United States Court of Appeals, for the Seventh Circuit.

The opinion of the United States Court of Appeals, for the Seventh Circuit, affirming said judgment was filed October 2, 1957, and was reported (248 F. 2nd, 737), and is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On December 4, 1957, it was ordered that the petition for rehearing be denied. (This order appears in the Appendix hereto.) This petition is filed within ninety days after the denial of the petition for rehearing in the United States Court of Appeals, for the Seventh Circuit. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

The petitioner concedes that the law clothes the Attorney General with the discretionary right to make a judgment when the requirements of due process have been properly met. Petitioner further may concede that the procedural requirements have been duly met, however, petitioner would vigorously urge the careful consideration of the following questions:

1. Did the Immigration & Naturalization Service violate the Fifth Amendment of the Constitution of the United States by arbitrarily and capriciously denying petitioner the right of Habeas Corpus? If so, was it re

versible error when the United States District Court, for the Northern District of Illinois, Eastern Division and the United States Court of Appeals, for the Seventh Circuit, did not take judicial notice of the denial of due process of law?

2. Is the scope of review narrow in the Courts when Due Process is denied, and there is arbitrary abuse of discretion by an agent or agency?

3. Does the Attorney General's refusal to grant relief to a statutorily eligible alien entitled to relief, when the alien has complied with all provisions and requirements of the Section constitute an abuse?

A. Does the decision of the Attorney General constitute an abuse when he has not fairly and justly considered the evidence presented, when the decision is contrary to the evidence and the requirements and provisions for relief under the Section have been met?

B. Should the terminology "legal discretion" and "absolute discretion" be clarified or defined?

4. Was it the intent of Congress when it vested the Attorney General with the power of discretion, to preclude the Courts from substituting their opinion, when the Attorney General granted a hearing, received evidence and rendered a decision?

5. Is the law to be interpreted that a government agency can accord a petitioner procedural due process by complying with provisions and requirements, make a decision and that the decision is irrevocable and not reviewable, even though the decision is not substantive due process?

6. What evidence would be required to justify a conclusion for relief under Section 243 (h) if the evidence submitted in this ~~case is not~~ perceived to be adequate?

STATEMENT OF THE CASE.

1. The petitioner is an alien, from Italy, born October 1, 1908. His only entry into the United States occurred in Baltimore, Maryland, on February 19, 1949, when he arrived aboard the S. S. Georgio and was smuggled into this country. The record proves that the petitioner fled from Italy for his life. The petitioner was persecuted by the communists, he was beaten and was in fear of his life. Petitioner is married to a native of Italy, there are three children born of this marriage. Petitioner, as the record shows, has supported his family since his arrival in the United States.

2. The petitioner is a person of good moral character and has been available to the Immigration and Naturalization Service at all times.

3. On February 25, 1955—Case No. (55C300)—in the United States District Court, for the Northern District of Illinois, Eastern Division, there was filed a complaint for restraining order (Sup. Appendix) seeking relief from the arbitrary, capricious action of the Immigration & Naturalization Service to deport petitioner on Sunday (a legal holiday) and deny him due process of law.

4. On March 4, 1955, the Honorable J. Sam Perry dismissed the suit because he felt it was not proper procedure (Sup. Ap. P 36a-37a), but went on to say that petitioner was deprived of his rights.

5. On March 22, 1955, petitioner filed with the Immigration & Naturalization Service a petition for a stay of deportation and a hearing under Title 8-Sec. 243(h),

Sec. 243.3, (Ap. P 148, 149-150) and was accompanied by affidavit of petitioner. Ex. 2.

6. On March 30, 1955—letter of clarification to R. H. Holton, District Director of Immigration & Naturalization, Chicago, Illinois, requesting disposition of petition filed March 22, 1955. (Ap. P 151 and 225). Ex. 3 and Ex. 42.

7. April 4, 1955—Regional Commissioner of Immigration & Naturalization at St. Paul, Minnesota denied relief and ordered petitioner deported on April 6, 1955.

8. The thirty days given petitioner to obtain affidavits substantiating physical persecution had not expired.

9. A long distance telephone call to the Regional Commissioner in St. Paul, Minnesota on the 5th day of April pointing out that there had not been a hearing under Section 243(h) brought forth a stay of deportation for thirty days. (Ap. P 228-229) Ex. 42.

10. Prior to the expiration of thirty days, thirty-two letters attesting to the physical persecution of petitioner were made part of the record. (Ap. P. 151-181 inclusive).

11. On June 10, 1955, petitioner received a letter from the Immigration & Naturalization Service informing him to prepare for deportation on June 13, 1955; which was a Monday.

12. On June 13, 1955 a petition for a writ of habeas corpus was filed under adverse conditions. (Ap. P 10-23) (Case No. 55C866).

13. On November 1, 1956 order dismissing petition was entered. (Ap. P 109-110).

EVIDENCE.

The evidence consists of forty-two exhibits in petitioner's Appendix, the Supplemental Appendix *in toto* and excerpts from the transcript of proceedings before the Honorable Philip J. Sullivan. Further, statements by the U. S. Attorney for the United States in the proceedings before the United States Court of Appeals for the Seventh Circuit.

Petitioner obtained from Italy 32 letters susbtantiating Petitioner's claim to physical persecution. They include, the Mayor of the Village of Sassano, the doctor who had treated petitioner for the bodily harm perpetrated, the ecclesiastical members of the church and school in Sassano, Italy. Members of the Police Department, Tax Office and Military Office, his wife and friends. (P. A. Ex. 5-37, pages 153-181)

Petitioner is and has shown that he is of good moral character, his obligations to his wife and children have not been shirked. Affidavits, attesting to his character and morality while in the United States have been made of record. He is and has proven that he is industrious and has adhered to the laws of our country since his entry. He has paid his taxes, attended the church of his faith and has been held in high esteem by the members of his community.

Petitioner has proven unequivocally that he is entitled to relief under Sec. 243(h) of the C. F. R. and Petitioner was denied due process of law. (Sup. Ap.)

REASONS FOR GRANTING WRIT.

1. The importance of this case lies in the fact that it presents important questions of federal law.

2. Of prime importance, a human life may hang in its balance

A. Petitioner was denied due process of law. (Sup. Ap. 29a, 35a, 37a, 38a)—which is a Constitutional Guarantee—(5th Amendment of the Constitution of the United States) *Yick Wo* v. *Hopkins*, 188 U. S. 356, 369, quoting the Fifth Amendment and further stating:

> **"to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality."**

Kwang Hai Chew v. *Caiding*, (1953) 344 U. S. 590, 73 Supreme Court on pages 477 and 478, the Court says:

> **"Although Congress may prescribe conditions for his expulsion and deportation, not even Congress can expel him without allowing him a fair opportunity to be heard."**

B. The record shows that a hearing for relief under Title 8, C.F.R. Sec. 243(h) and Sec. 243.3 were granted to petitioner. (Petitioner's Appendix, pp. 148-149-150) These hearings were procedural and not substantive (they bring to mind the hanging Judges of the old West—Rights without remedies) and not in conformity with the regulations. A letter dated March 30th, 1955 seeking clarification and pointing out grievances (P.A. Ex. 3, pages 151-152) to the District Director, again we point to *Kwang Hai Chew* case, 73 Supreme Court, footnote No. 7, where the Court said:

> **"When the condition requires a hearing it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."**

Mastropasqua v. *Shaughnessy*, C.A.N.Y. 180 Fed. 2nd 999, wherein the Honorable Judge Jerome Frank delivered the opinion of the court joined by Honorable Judge August Hand:

> **"but, in appropriate circumstance, they can compel correction of an abuse of discretion or can compel an official to exercise his discretion where he has obviously failed or refused to so do. Such an obvious re-**

fusal occurs, we think, when an official sets up a class of cases as to which he refuses ever to exercise any discretion, one way or another, if that class is not rationally differentiated from the other cases, not within the class where he uses his discretion case by case."

C. The fact that the Immigration and Naturalization Service did not allow petitioner the time to support his claim of physical persecution with the exception of a long distance phone call to the Commissioner at St. Paul, Petitioner would have been deported and would have been subject to physical persecution or death. It is inescapable that the conclusion should be, that the Immigration and Naturalization Service were abusing their discretion. (P.A. 73-74-75) *Duncan* v. *Missouri*, 152 U. S. 377, page 382, the Court says:

and due process of law and equal protection of the law are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Darnell v. *Tomelson*, 220 F.2nd 894, the court said:

"Aliens who have passed through our gates, even illegally may be expelled only after proceedings conforming to traditional standards of fairness, encompassed in due process of law."

On page 100 of the P. A. the U. S. Attorney stresses the word *opinion* in the modification of language of Sec. 243(h).

It is inconceivable that the decisions of our great jurists meant to confer such power as to allow anyone delegated with authority to flagrantly hide behind procedural compliance with disregard for proper considerations of evidence and fairness in conclusion.

The Attorney General's refusal to grant relief to a statutorily eligible alien seeking relief by virtue of the delegated authority vested in the Attorney General by

Congress is reviewable by the courts, as it constitutes an arbitrary abuse. *Carter* v. *Carter Coal*, 228 U. S. 291; *Mastropasqua* v. *Shaughnessy*, C.A. N.Y. (1950) 180 F. 2d 999.

A perfect case—beyond any question of complying with the law and provisions of a statute—would be helpless in the light of that interpretation of discretion conferred upon the Attorney General. Should the Attorney General in his discretion and opinion decide arbitrarily.

D. On September 9, 1957, before the United States Court of Appeals, for the Seventh Circuit, counsel was asked if he thought that this Court could substitute its opinion for the decision of the Immigration and Naturalization Service. Counsel's answer was that it could not if there had been no abuse of discretion. However, the record showed that there had been an abuse of discretion. A further question was asked: "If the petitioner were returned to any other city in Italy was there any proof that he would be physically persecuted". If the court meant that a requirement to comply for relief under Section 243(h) was to evidence and substantiate by proof that the petitioner would or would not be physically persecuted if returned to any other city in Italy such requirement would render the statute unworkable. In the light of the statute we submit that the question of physical persecution in any other city in Italy is not required. Congress in its wisdom used language limiting the statute to any country. This court we are sure would agree, if a hearing were granted, evidence received and considered and the conclusion was against the weight of the evidence to such an extent that it was arbitrary, that the courts indeed have the authority, capacity and responsibility to declare the decision of the Immigration and Naturalization Service an arbitrary abuse of discretion. If this kind of evidence submitted in this case is not sufficient to justify the conclusion that the petitioner would

be subject to physical persecution, and is not perceived as adequate to comply under the statute, when there is not a scintilla of contrary evidence to the evidence submitted, and accepted without question and later declared as unquestioned evidence by the Immigration and Naturalization Service, there could be no evidence held as sufficient to comply under the statute.

Wong Yang Sung v. *McGrath*, 338 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 9 (1950):

> **"Where the Court interprets the words 'required by statute' to include what the courts had read into the statutes to make them conform to the requirements of due process."**

CONCLUSION.

While petitioner recognizes that there are many cases urgently requiring the attention of the Supreme Court, it is respectfully submitted that for the foregoing reasons stated in this Petition for Writ of Certiorari and because the framers of the Constitution wisely gave protection to those who were not afforded due process of law and because human life may be at stake, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PROTAGORAS DIMITRIOS MAKTOS,
Attorney for Petitioner.

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11972 SEPTEMBER TERM AND SESSION, 1957

UNITED STATES OF AMERICA ex rel. ANGELO ANTONIO CANTISANI, *Petitioner-Appellant*, v. R. J. HOLTON, District Director of Immigration and Naturalization Service of Chicago, *Respondent-Appellee*. } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 2, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. Petitioner, detained under a writ of deportation, filed a petition for a writ of habeas corpus in the District Court. The writ was denied. Our concern here is not with the main deportation proceeding.

Petitioner cannot properly claim that he was denied procedural due process. Petitioner entered this country illegally in February, 1949. He was given a hearing by the Immigration authorities on April 16, 1953. He had three separate hearings. Prior to the first hearing he was given on request of counsel, three weeks additional to prepare for the hearing. Later he was given a thirty-day

continuance, and after he was ordered deported, he was granted a further extension of thirty days in order to secure evidence. He filed petitions for three writs of habeas corpus in the United States District Court for the Northern District of Illinois. During the pendency of the last hearing, Judge Sullivan granted a continuance so that the immigration authorities could hold a *de novo* hearing pursuant to the provisions of §243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. §1253 (h)).

Petitioner is a native and citizen of Italy. His only entry to this country was in February, 1949, at Baltimore, Maryland, from an Italian ship where he had been a stowaway. He testified that he had paid a person in Genoa, Italy, 800,000 lire in order to be smuggled into this country. At the time of entry, petitioner intended to remain permanently in the United States, and did not have an immigration visa.

Petitioner designated Italy as the country to which he should be deported in the event he was ordered deported pursuant to law. There is no evidence that he has had any connection with any subversive groups either within or outside the United States. There is also no question but that he has been a person of good moral character within the preceding five years, and was statutorily eligible for voluntary departure.

Petitioner was married to an Italian woman in 1932. Three children were born of this marriage in Italy and have been residing with petitioner's wife in that country. No one in the United States is dependent upon him for support. He owns no property in this country. The record shows that he helped support his family in Italy by sending them money from time to time.

The real issue in this case is whether the record discloses an abuse of discretion by the Attorney General. Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1253(h)) provides: "The Attorney General is authorized to withhold deportation of any alien

within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Petitioner atempted to prove largely by letters from officials and residents of the Village of Sassano, Province of Salerno, Italy, that if Petitioner returned to the Village of Sassano he would be subject to persecution and abuse by Communistic elements. As an illustration of such letters which were received and considered by the hearing officer, was a letter from the Mayor of Sassano which read, in part: "Said individual (Petitioner) until the time of his immigration to the United States was a lumberman. As a result of a controversy with the Provincial Chamber of Labor of a communistic shade, became persecuted by some people who in the pretended attitude of defending the rights of the workers, were about to ruin him financially and professionally. The local Communists were after this man for some time. • • •" Other letters as well as testimony of Petitioner disclosed that Communists in Sassano broke Petitioner's leg in 1942, stole some of his lumber and threatened his life. Petitioner insists that his life would be in danger if he returned to the Village of Sassano.

In the field of immigration and nationality, Congress has vested wide discretionary powers in the executive branch of the government. *United States of America ex rel. Moon* v. *Shaughnessy*, 2 Cir., 218 F. 2d 316, 318. The Attorney General or his delegate has been given a wide area of discretion in those cases where the alien believes that he would be subjected to persecution if deported to a specified country. *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 206 F. 2d 392, 394. However, where an alien has been accorded procedural due process and his application has received fair consideration, courts may not substitute their judgment for that of the Attorney General or his representative. See, *United States ex rel. Ciannamea* v. *Neelly*, 7 Cir., 202 F.2d 289, 293.

The comparable section to §243(h) in the predecessor statute (§23 Internal Security Act of 1950, 64 Stat. 1010) provided: "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." The change in language in the present statute has been interpreted by the courts as indicating an attempt by Congress that in cases where the alien claims he would be subjected to physical persecution, the determination of such claim shall rest in the administrative judgment and the opinion of the Attorney General or his delegate, *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 206 F. 2d 392, and *United States ex rel. Moon* v. *Shaughnessy*, 2 Cir., 218 F.2d 316, assuming, of course, the alien has been afforded procedural due process and that the hearings as conducted were not manifestly unfair to him.

In spite of inferences in some of the unsworn letters, there is no proof in this record that the authoritiies of the Village of Sassano, admittedly noncommunist, could not afford protection to petitioner. He owns a home there, his wife and three children have resided there continuously. Furthermore, petitioner has been ordered deported to Italy and not to the village of Sassano. There is no proof that other places in Italy would not be safe for petitioner. Judicial notice may be taken that the existing government in Italy is controlled by the Christian Democratic party which has a long record of antagonism to Communism.

We hold petitioner has not established that the Attorney General or his designate has been guilty of abuse of discretion in denying Petitioner relief under §243(h) of the Immigration and Nationality Act of 1952. Also, Petitioner was afforded due process. The District Court was correct in denying the petition for a writ of habeas corpus.

AFFIRMED.

FINNEGAN, *Circuit Judge, concurring.* *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72 (1957) decided earlier this year, underscores the scope and nature of discretionary suspension of deportation and for that reason I would mention it when joining in and approving Judge Duffy's opinion. When Congress confers power on a public official in terms of discretion there is little room for judicial interference with the exercise of such authority in the absence of clear abuse. The persistent wave of cases seeking review where discretion has been utilized approach the question in oblique fashion. For the attack should be leveled only when discretion is abused, unless there is an unconstitutional delegation of the discretionary power.